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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-702

BRUCE CHARLES BURGER, *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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28 USCA (1257(3) 2

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No.

BRUCE CHARLES BURGER, *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland entered July 3, 1973.

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, No. 555, Sept. Term 1972 is reprinted in Appendix A hereto. Said opinion is unreported.

JURISDICTION

The Court of Special Appeals of Maryland entered its Judgement on April 16, 1973. A timely petition for certiorari was filed with the Court of Appeals of Maryland. The Court of Appeals of Maryland denied certiorari on July 3, 1973, a copy of said Order is reprinted in Appendix A hereto. A request for an extension of time within which to petition for Certiorari was filed and an extension was granted until October 31st, 1973.

The jurisdiction of this Court is invoked under 28 USCA 1257(3).

THE QUESTIONS PRESENTED

1. Does the right to a speedy trial include the right to a speedy mental examination in a case where insanity is the only defense and did the Government's failure to comply with two court orders ordering a speedy mental examination in this case severely prejudice the Petitioner, violate the Petitioner's right to a speedy trial and *de facto* deprive him of his only defense without due process of law?

2. Did the Trial Judge improperly interfere with and change the Jury's verdict thereby depriving the Petitioner of his right to a jury trial and thereby depriving the Petitioner of his liberty without due process of law?

3. Was the Petitioner deprived of his right to a trial by an impartial jury by the Trial Judge's failure to allow Petitioner's counsel to ask certain key *voire dire* questions to the jury?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are

Amendment 5 to the United States Constitution
Amendment 6 to the United States Constitution

Amendment 14 Section 1 of the United States Constitution

The provisions of said Constitution are printed in Appendix B hereto.

STATEMENT

The Petitioner in this case, Bruce Charles Burger, was arrested on Feb. 16, 1971 and charged with 6 counts of sale and possession of LSD and Hashish (R.1).

On March 22, 1972, Bruce Charles Burger, now a full-time student at Montgomery Junior College, went to trial. He pleaded "Not Guilty by Reason of Insanity." (R. 11).

At the trial defense counsel requested that certain written questions be asked the jury on *voir dire* examination (Tr. 13). Petitioner's counsel's request to ask certain key questions on *voir dire* to the jury was denied (Tr. 14). Petitioner noted his objection, which was overruled (Tr. 13-14).

The proposed questions which were denied are stipulated to have been the following:

(A) "Is there anyone among you who doubts there are circumstances under which smoking marijuana could cause an illness and/or a mental defect?"

(B) "Is there anyone among you who feels that a person should be punished if he physically and/or psychologically has to use drugs, regardless of the circumstances?"

(C) "Is there anyone among you who could not give the defendant a fair trial because he feels the use of drugs is contrary to the teachings of his religion?"

(D) "Is there anyone among you who could not give the defendant a fair trial because he [she] feels the sale of drugs is contrary to the teachings of his [her] religion?"

(E) "Is there anyone among you who could not give the defendant a fair trial because he [she] feels the giving away of drugs is contrary to the teachings of his [her] religion?"

(F) "Is there anyone among you who knows someone who has used drugs and has suffered from it?"

(G) "Is there anyone among you who doubts that the use of drugs can change a person's perception of reality?"

(H) "Is there anyone among you who doubts that the use of drugs can and does impair a person's ability to know the difference between right and wrong?"

(I) "Is there anyone among you who doubts that the use of drugs could impair a person's ability to know the difference between right and wrong?"

(J) "Is there anyone among you who believes that police officers never sell drugs?"

(K) "Is there anyone among you who believes that police officers never entrap people?"

The Trial Judge ordered, on 2 occasions, that the government conduct a mental examination of the Petitioner within 60 days (June 17, 1971 and 27 July 1971) (R. 12, 15). It was not until the 7th of December 1971 (Tr. 111 [12-15]) that the government conducted this examination. Clearly, by the government's expert's own admission, this time delay hurt their ability to make an accurate diagnosis of Petitioner's condition at

the time of the incidents in question, particularly as Petitioner had been undergoing treatment.

Petitioner's counsel attempted to show Petitioner had been under the prolonged and intensive care of a psychiatrist since the appellant had been charged (Tr. 187). Petitioner's counsel further attempted to show that petitioner was rehabilitated and sane when the government psychiatrists interviewed him in a 2 1/2 hour interview some 12 months after the alleged offense (Tr. 196 [1-2]). Petitioner's counsel further attempted to show that because petitioner had been rehabilitated, it would be practically impossible to determine with a reasonable degree of medical certainty that Petitioner had been sane at the time of the alleged incident.

Petitioner's psychiatrist, Dr. Murphy, testified that he had first seen petitioner in March 1971 (3 months after the incidents in question), and that Petitioner had been seen by him about 25 times (Tr. 187), that Petitioner was insane at the time of the alleged offense (Tr. 196 [1-2]), but that he had subsequently improved and was now a full-time student with good grades (Tr. 194 [4]).

The government expert, Dr. Sauer, saw petitioner for 2 hours on December 7, 1971, 10 months after the alleged incidents (Tr. 111 [12-15], Tr. 112 [16-18]).

The record of the government's case speaks for itself.

Examination of Dr. Sauer:

". . . We did make a diagnosis of drug dependence in Mr. Burger's case, and we feel that he was an habitual, heavy user of marijuana." (Tr. 119 [20-21]).

* * *

"Q. Do you think it likely that in the period between the time of these offenses and the time of your seeing Mr. Burger that he would have been unable to conform his conduct to the law, but then undergo such a cure within those months that he would be able to give you the impression that he had always been able to conform his conduct?

"A. Well, of course, this is a possibility. However, nothing that he told me or that would make me think that he was in such a state at any time in the past.

"Q. Your witness."

CROSS EXAMINATION

By Mr. Rosenberg:

"Q. I noticed you said that he had drug dependency. Is that a mental disease or defect?

"A. Well, it is a mental disorder, and the American Psychiatric Handbook, I think, under the Maryland definition of a disease, it would have qualified as one.

"Q. And that would be under the APA Diagnostic and Statistical Manual of Mental Disorders, and that is 304.5, Drug Dependence, Cannabis sativa (hashish, marijuana)?

"A. Yes." (Tr. 122-123)

* * *

Examination of Dr. Mackay:

"Q. So that if a person is smoking more and more marijuana his hallucinogenic state, which he really puts himself into, as I understand the studies on marijuana, through his own psycho mechanism, is that right, Doctor?

"A. If he voluntarily smokes it himself his psycho mechanisms, not the cortical center, are so altered that he has a reactive confusional state to the entire concept of drugs.

"His own mind, his thinking processes, well, of course, they are confused, the more he takes.

"Q. If he can't think, Doctor, how can he conform?

"A. If he can't think he can't conform, of course (Tr. 158).

* * *

"Q. He could have been severely disordered?

"A. I am sure he was. I would be severely disordered if I had a lot of what he is alleged to have had.

"Q. You are talking about drugs?

"A. I am.

"Q. You would have been?

"A. Oh, yes, and so would you." (Tr. 174)

* * *

"Q. So that he was so confused and so disordered he might not have been able to understand or conform to the law?

"A. He wouldn't understand anything, perhaps." (Tr. 176)

* * *

The jury found Petitioner guilty on counts 1 and 4, and the forelady, in giving the verdict, said:

"I have one more thing to say. We were permitted to request leniency and continued rehabilitation. We only make these guilty verdicts with the request for leniency and continued rehabilitation". (Jury Verdict Tr. 3-4).

Defense counsel argued that, in effect, the jury did not understand the Judge's instructions and had reached a compromise verdict where the jury, after approximately one hour and 50 minutes, came to a compromise and decided to find the Petitioner sane, only if he kept under the constant care of his psychiatrist, and is permitted to continue going to school.

The Judge had trouble hearing the verdict (July Verdict Tr. 4 [20]) and the State's Attorney, when asked by the Judge what the verdict was, did not inform the Judge of the conditional wording of the verdict (Jury Verdict Tr. 5 [19-25]).

A verdict of "Guilty" on both counts (sale of LSD and possession of hashish) was entered at the suggestion of the State's Attorney, the conditional verdict being tossed aside as constituting the mere surplusage of a mercy recommendation (Jury Verdict Tr. 5-6). Petitioner was released on a $5,000 surety bond pending the determination of this appeal (Jury Verdict Tr. 7).

Petitioner was sentenced to serve 2 1/2 years. Petitioner filed a timely appeal to the Court of Special Appeals of Maryland (R 59, 63).

Petitioner's brief to the Court of Special Appeals of Maryland raised and addressed itself to the 3 questions before this Court (p. 20-31).

The Court of Special Appeals of Maryland affirmed the decision of the lower court by its order of April 16, 1973 (R 77).

The Court's opinion (See Appendix A) addressed itself to the question dealing with the refusal to allow voire dire questions and to the question of improper change of the jury verdict. The Court however chose to avoid the claimed constitutional issue arising out of the State's failure to provide mental examinations as ordered by the Trial Judge.

Petitioner filed a timely petition for certiorari to the Court of Appeals of Maryland and on July 3, 1973 the Court of Appeals of Maryland denied the petition (R 78).

REASONS FOR GRANTING THE WRIT

A) Petitioner believes that he is raising a Constitutional question the substance of which has not been heretofore determined by this Court. This question is the first question listed by the Petitioner, namely:

> Does the right to a speedy trial include the right to a speedy mental examination in a case where insanity is the only defense and did the government's failure to comply with two court orders ordering a speedy mental examination in this case severely prejudice the Petitioner, violate the Petitioner's right to a speedy trial and *de facto* deprive him of his only defense without due process of law?

In this case, the government, in violation of *2* Court Orders ordering mental examination of the Petitioner with 60 days, delayed such examination until 10 months after the Petitioner was arrested.

When the government's experts finally examined the Petitioner they admittedly could only speculate as to his mental state some 10 months before, as at the time of their examination, he was no longer using drugs and/or suffering from their aftereffects. In addition, he had by then completed 10 months of very extensive psychistric care, and his condition was a fairly normal one.

Thus, it would be argued that the government by its failure to promptly examine the Petitioner as ordered 2 times by the lower court, effectively deprived the Petitioner of his only defense: his mental state at the time of the offense.

Inherent in the concept of a right to a speedy trial is the right to freshly preserve evidence: witnesses die, memories change, and appearances of evidence and individuals may change. A right to a speedy trial has been said to be a relative one to be judged by all the surrounding circumstances. *Beavers* v. *Haubert* (1905) 198 US 77, 49 L Ed 950, 25 S Ct 573; *United States ex rel. Hanson* v. *Ragen* (7th Cir. 1948) 166 F.2d 608.

It is argued that in an insanity defense case such as this one where the accused was under the heavy influence of drugs and hallucinogens at the time of the offense, it is essential that he be given a prompt mental examination. Not to do so borders on the suppression of the only evidence he has (his current seriously confused state of mind) and as such it can be argued that it unconstitutionally violates due process of law if the State delays such an examination. *United States ex rel. Almeida* v. *Baldi* (3rd Cir. 1952) 195 F.2d 815, 33 ALR2d 1407, cert den 345 US 904, 97 L Ed 1341, 73 S Ct 639, reh den 345 US 946, 97 L Ed 1371, 73 S Ct 828; *Curran* v. *Delaware* (3rd Cir. 1958) 259 F.2d 707, cert den 358 US 948, 3 L Ed 2d 353, 79 S Ct 355.

Furthermore such conduct on the part of the State invokes a gut reaction of being unconstitutionally violative of due process in that it blatantly disregards respect of values implicit in the concept of ordered liberty. *Palko* v. *Connecticut* (1937) 302 US 319, 325, 82 L Ed 288, 292, 58 S Ct 149.

It is worthy also to note that four Justices have acknowledged that the Due Process Clause of the Fifth Amendment would require dismissal of an indictment if it were shown that pre-indictment delay caused substantial prejudice to the defendant's right to a fair

trial and assuming the delay was purposeful. *United States* v. *Marion* (1971) 404 US 307, 30 L Ed 2d 468, 92 S Ct 455.

Such conduct is violative of the assured's right to a fair trial and the right to a fair trial is clearly protected by the Due Process clause of the Fourteenth Amendment.

B) On the *voire dire* issue, Petitioner's attorney attempted to ask questions which would disqualify for cause. Petitioner is not asking for a degree of impartiality which would be impossible to obtain. (*Irvin* v. *Dowd* (1961) 366 US 717, 6 L Ed 751, 756, 81 S Ct 1939). He is asking for a very reasonable standard and the due process of law in the Fifth and Fourteenth amendments requires a hearing to be before a fair and impartial tribunal and violate his right under the Sixth amendment.

C) Finally on the issue of improper change or interference with the jury's verdict, if the Court agrees with Petitioner's contention that the verdict was in fact interfered with and as such illegally changed, the result should be clear. Such conduct would be violative of due process and could be said to offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Leland* v. *Oregon* (1952) 343 US 790, 96 L Ed 1302, 1309, 72 S Ct 1002, reh den 344 US 848, 97 L Ed 659, 73 S Ct 4; *Rochin* v. *California* (1952) 342 US 165, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396.

Furthermore it would be violative of Petitioner's right to a jury trial as guaranteed by the Sixth Amendment.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

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APPENDIX

APPENDIX A

IN THE
COURT OF APPEALS OF MARYLAND

Miscellaneous Docket No. 123 (Criminal)

September Term, 1973

(No. 555, September Term, 1972
Court of Special Appeals)

BRUCE CHARLES BURGER

v.

STATE OF MARYLAND

Order

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case. it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: July 3, 1973.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 555

September Term, 1972

Gilbert
Menchine
Scanlan,
JJ.

Per Curiam

Filed: April 16, 1973

The appellant, Bruce Charles Burger, was convicted by a jury in the Circuit Court for Montgomery of violating Md. Ann. Code art. 27, § 286(a)(1) (Sale of Lysergic Acid Diethylamide — LSD), and Md. Ann. Code art. 27, § 287(a) (Possession of Hashish). As a result of the convictions, Judge James H. Pugh sentenced the appellant to concurrent terms of 2-1/2 years and 6 months, respectively.

Appellant vigorously assails the judgments of conviction. He asserts:

"1. The jury could not be reasonably expected to 'disregard' the 6,000 LSD tablets placed before them which had been introduced into evidence and had played a central part in appellant's trial, and appellant's request for a mistrial should have been granted.

2. The admission of the small quantity of hashish and marijuana, which was not in the exclusive possession of the appellant, but which was found in 2 or 3 rooms of an apartment shared by appellant and 2 other persons, was reversible error.

3. It was reversible error not to allow appellant's counsel to ask certain key *voir dire* questions to the jury.

4. The trial judge, who could not hear the jury's verdict, improperly interferred (sic) with and changed said verdict at the suggestion of the State's Attorney.

5. The prosecution, as a matter of law, failed to meet its burden of showing that the appellant was sane at the time of the alleged offense."

The 6th contention of the appellant is that the "cumulative effect" of the first 5 arguments "warrants a new trial."

There is no dispue over the factual situation out of which the charges arose and no useful purpose will be served by setting them forth in full. We shall refer only to such facts as may be necessary to clarify our discussion on a particular issue.

I

The appellant was indicted in a 7 count indictment for: (1) delivering and distributing LSD, (2) possession with intent to distribute LSD, (3) possession of LSD, (4) possession of hashish, (5) possession with intent to distribute hashish, (6) conspiring to deliver Mecaline and LSD, and (7) maintaining a common nuisance.

The testimony revealed that the appellant made two sales of LSD to an undercover police office of the Metropolitan Police Department, Washington, D.C. One was a sale of 1,000 LSD tablets [1] occurring in Montgomery County, Maryland. The other sale took place in the District of Columbia and is not involved in this case. After the sales had been consummated, a search and seizure warrant was obtained

[1] The apparent agreement between the appellant and the undercover officer was that appellant would sell to the officer 1,000 LSD tablets for the sum of $300.00. After the sale, the tablets were counted by a police officer and did in fact number 1,003. The chemist who testified placed the number at 1,022. He stated, however, that he counted by weight and that this method was less accurate as it included the dust that was in the plastic bag which contained the tablets.

by the Montgomery County Police Department and it was executed in a timely fashion. No contention is made that there was not probable cause for the issuance of the warrant. No LSD was found in the apartment occupied by the appellant and two other males, although LSD in substantial quantity was found near a stairway leading from a rear porch to the back yard.

The packages of LSD tablets were admitted, over objection, into evidence by the trial judge. Later, however, Judge Pugh struck the evidence and told the jury:

> "Ladies and gentlemen of the jury, the evidence that has been stricken you will disregard that as evidence in this case as being in the possession of the defendant. The Court has ruled that wasn't in the exclusive possession of the defendant and if it wasn't in the exclusive possession it couldn't be in his possession for purposes of a count in the indictment, so it will be removed from the case and you will disregard that evidence."

When court reconvened following a recess, the appellant's counsel made a motion to strike the four exhibits which pertained to the LSD, which the court granted. The State resumed its case which continued through to the morning of the next day. At the conclusion of the State's case, a judgment of acquittal was entered on counts 2, 3, 5 and 6. The appellant then called his only witness, Dr. Bernard W. Bernard W. Murphy, a psychiatric specialist.

When examination of Dr. Murphy had been completed by both the appellant and the State, the court recessed. When the court reconvened, counsel for the appellant moved for a mistrial on the ground that "error was committed when the parcel [containing the LSD] that was found by the steps was originally admitted into evidence, and it is quite possible, Your Honor, that you could hold; (sic) I should have moved for a mistrial at that time when Your Honor decided to exclude [the evidence] . . . and it had been before the jury for quite some time, and a large quan-

tum of objective evidence had been given with respect to that particular parcel."

The answer to appellant's contention is two-fold; firstly, the decision of whether or not to grant a mistrial rests within the sound discretion of the trial judge, which discretion will only be disturbed on appeal when there is a clear showing of abuse. *Collins* v. *State,* 14 Md. App. 674 (1972); *Gerstein* v. *State,* 10 Md. App. 322 (1970); *Parker* v. *State,* 7 Md. App. 167 (1969); *Baldwin* v. *State,* 5 Md. App. 22 (1968). In *Baldwin,* we said, at 28:

> "A mistrial should be granted only where plain and obvious reasons exist, upon the greatest caution, and under urgent circumstances. Where, in the exercise of this discretion, the trial court refuses to grant a mistrial, such a decision will not be disturbed on appeal without giving full regard to the fact 'that the trial court is in an advantageous position to judge the question of prejudice, and its decision with reference thereto should not be reversed unless it is clear that there was prejudice.' *Carroll* v. *State,* 3 Md. 50, 53, 237 A.2d 535, 538 (1968) quoting *Cook* v. *State,* 225 Md. 603, 610, 171 A.2d 460, 463, cert. den. 368 U.S. 970, 82 S.Ct. 445, 7 L.Ed.2d 398 (1961)."

In the instant case, Judge Pugh struck the evidence and admonished the jury that it was to disregard the same. Under the circumstances of this case no further action was required.

Secondly, no motion for a mistrial was made until a point much later in time, *i.e.,* on the next day and only then at the conclusion of all the evidence. Even if we were to assume that grounds for a mistrial did exist (which assumption we do not make), the motion came too late. It is waived. An accused may not, if he perceives error necessitating a mistrial, sit back and wait until he sees how the entire trial is going, and, if he evaluates his chances of acquittal to be unfavorable, then and only then assert his alleged earlier claim for a mistrial.

II

The three room apartment in which the appellant resided was shared by two other occupants. The record reveals that in the "front bedroom" was found hashish, a form of marijuana,[2] and a "marijuana roach." Additionally, a jacket containing a letter addressed to appellant was strewn across the bed and a wallet containing appellant's identification was located on the fireplace mantel. Some marijuana was found in the "center room."

Appellant argues that the "front bedroom" and the room with the fireplace are not one and the same. We disagree. Detective Corporal Harold L. Fremeau of the Montgomery County Police Department testified relative to the results of the search of the apartment:

[Assistant State's Attorney]

> "A. It is . . . taken from the front bedroom, with the fireplace which contained the identification of [appellant].
>
> Q. Other than [these] items . . . what if anything did you find in that bedroom, that front bedroom that had contained [appellant's] identification?
>
> A. We found a wallet containing the identification of [appellant] and $20.00 U.S. currency and a letter from a jacket pocket which was laying on the bed, which was addressed to [appellant]."

---

[2] Md. Ann. Code art. 27, § 277(o) defines "Marihuana" (also spelled "marijuana") as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin, ..." "Hashish" is "purified extract prepared from the dried flowers of the hemp plant [Cannabis sativa] . . . ." *American Heritage Dictionary of the English Language.* Hashish is a derivative of marijuana and is a controlled dangerous substance within the ambit of Md. Ann. Code art. 27, § 276 *et seq.*

Appellant argues that the evidence did not show that he had the exclusive possession of the entire apartment, and there is no evidence showing which, if any, of the bedrooms belonged to him except for the presence of the appellant's wallet containing his identification and the jacket containing the letter. Appellant asserts that even if one construes these to be sufficient evidence to infer that the room was in fact that of the appellant, it was not demonstrated that the appellant was in the room at the time of the search, and, consequently, the appellant was not "clearly" in exclusive control even of that room. We think appellant's reasoning to be specious. In *Davis and Green* v. *State,* 9 Md. App. 48 (1970), we said, at 52-53:

> "It has been held that where one has exclusive possession of a home or apartment in which prohibitive narcotics are found, it may be inferred, even in the absence of other incriminating evidence, that such person knew of the presence of the narcotics and had control of them; but where the accused has not been in such exclusive possession, it may not be inferred that he knew of the presence of the narcotics and had control of them, *unless other incriminating circumstances are shown which tend to buttress such an inference* . . . The Supreme Court of California pointed out in *People* v. *Redrick,* 359 P.2d 255, that no sharp line can be drawn to distinguish the congeries of facts which will, and those which will not, constitute legally sufficient evidence that a person had control of a narcotic found in a place to which he had access, but not exclusive access, and over which he had some control but not exclusive control." (Emphasis supplied).

In the instant case those incriminating circumstances include the fact that in the bedroom in which the jacket containing the letter addressed to appellant was found, there was also "one package of cigarette papers, one package of . . . plastic baggies, containing a green substance, and two books of matches." The substance was identified as hashish. In the same room on top of the fireplace mantel

was one package of Marvel cigarette papers, a gold cigarette case containing a marijuana roach, a piece of filter screen, and a wallet with identification indicating it belonged to the appellant.

We conclude that the jury, as the trier of fact, could justifiably conclude that the appellant knew of the presence of the controlled substances in the apartment and had control of them. Such an inference is buttressed by the "other incriminating circumstances" which were shown.

III

Appellant's third argument is devoid of merit. He contends that he was not allowed to ask certain *voir dire* questions of the jury. While it is admitted that the trial court did question the jury on *voir dire*, we are unable to evaluate those questions because the *voir dire* was not recorded. The record is silent as to what questions were actually asked of the jury and their responses thereto. Appellant contends that the series of questions which he submitted to us were not asked by the trial court. This may be so but we are unable to say that the questions were asked by the trial court did not touch upon or embrace the specific questions of the appellant. We cannot decide the issue on the basis of the record before us. There is nothing for us to review. *See Gibson, Tate and Austin* v. *State,* 17 Md. App. —— (1973) [Nos. 413, 464, 629, Sept. Term, 1972, decided Feb. 28, 1973].

IV

Appellant next contends that the trial judge improperly interfered with and changed the jury's verdict at the suggestion of the Assistant State's Attorney. We disagree. The entire proceeding reads as follows:

> "THE FORELADY: We find the defendant, Bruce Charles Burger, sane at the time of the commission of the crime.

THE CLERK: What say you, is he guilty of the matter whereof he stands indicted under Count Number One or not guilty?

THE FORELADY: Guilty on Count One.

THE CLERK: Is he guilty of the matter whereof he stands indicted under County Number Four or not guilty?

THE FORELADY: He is guilty on Count Number Four.

THE CLERK: Ladies and gentlemen of the jury, hearken to your verdict as it stands recorded.

THE FORELADY: I have one more thing to say. We were permitted to request leniency and continued rehabilitation. We only make these guilty verdicts with the request for leniency and continued rehabilitation.

THE COURT: You have a right to recommend mercy.

[ASSISTANT STATE'S ATTORNEY]

May we approach the bench, Your Honor?
Bench Conference reported as follows:

[ASSISTANT STATE'S ATTORNEY]

If Your Honor please,—

THE COURT: I didn't hear all of what she said.

[ASSISTANT STATE'S ATTORNEY]

She requested leniency and continued rehabilitation. The Rule doesn't contemplate that kind of limitation, but we don't have any argument with the form of the verdict.

[DEFENSE COUNSEL]

My problem, Your Honor, is that I think that we have here a jury, after approximately one hour and 50 minutes, coming to a compromise where they are going to find the boy sane, if we keep him under the care of the same rehabilitative forces, going to school and the psychiatrist.

I know there have been capital cases where the jury has been reinstructed that they can come back with leniency or mercy in the case.

THE COURT: The Court construes the request in substance as a recommendation of mercy. The other words outside of it recommending mercy the Court will just consider as surplus, but in substance it is a recommendation of mercy and the jury has a right to do that.

[ASSISTANT STATE'S ATTORNEY]

We submit that that is true, Your Honor.

THE COURT: So I think the verdict can be taken and recorded. Do you wish to poll the jury?

[DEFENSE COUNSEL]

I think I would, yes.

[ASSISTANT STATE'S ATTORNEY]

Perhaps Your Honor would want to inquire of the jury if their verdict is guilty on those two counts with a recommendation for mercy.

THE COURT: Did they report that?

[ASSISTANT STATE'S ATTORNEY]

She did, but she, of course added the words recommend leniency and continued rehabilitation. I think that a proper term would be guilty under the two counts of the indictment, with a recommendation of mercy.

THE COURT: Very well.

(Whereupon, the hearing resumed in open court).

THE COURT: Poll the jury. Just ask whether the forelady's verdict is their verdict.

(Whereupon, the Clerk asked of each juror whether the forelady's verdict was their verdict and all answered, yes.)

Ladies and gentlemen of the jury, hearken to your verdict as it stands recorded. Your forelady saith that Bruce Charles Burger, prisoner at the bar, is sane, that he is guilty as charged under Count Number One, that he is guilty as charged under Count Number Four of the indictment, and so you all say?

THE JURY: Yes."

We think it clear that the jury's verdict as finally enrolled was that the appellant was found sane and guilty of counts 1 and 4. We cannot share appellant's view that the verdict was qualified to such an extent that it was illegal. The recommendation of "leniency and continued rehabilitation" is surplusage.

V

Penultimately, appellant argues that the State failed to show that the appellant was sane at the time of the alleged offense. Our perusal of the testimony discloses that Drs. Sauer and Mackay both related to the jury that in their (the doctors') individual opinions the appellant was sane within the meaning of Md. Ann. Code art. 59, § 25(a); that while the appellant may have suffered from a drug related "mental disorder" he did not lack "substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Dr. Murphy, a privately retained psychiatrist testifying for the appellant, found, on the other hand, that the appellant was insane at the time of the commissions of the crimes and was unable to conform his conduct to the requirements of law. Basically, the appellant argues that the doctors who testified for the State did not examine the appellant until some time after Dr. Murphy had been treating the appellant. Appellant says it is impossible for the State's doctors to know the appellant's mental condition at the time of the commission of the crimes. He reasons that they only saw him following the successful treatments by Dr. Murphy. The

State's doctors felt, however, that they could give an opinion to a reasonable degree of medical certainty. This issue presented a question of fact for the jury and not for this Court. We do not weigh evidence nor judge the credibility of witnesses. If, as happened here, the jury believed the State's doctors and not Dr. Murphy, such belief on the part of the jury is no ground for reversal. They are entitled to accept and weigh any witness. We find appellant's contention to be devoid of merit.

VI

Ultimately, appellant, in a recapitulation of all his preceding arguments, contends that when those arguments are lumped into one "ball of wax" they indicate that the appellant did not receive a fair and impartial trial. We disagree. We have found appellant's first five contentions to be lacking in merit. The sixth argument grounded on the other five must fail of its own weight.

JUDGMENTS AFFIRMED.
COSTS TO BE PAID BY APPELLANT.

APPENDIX B

United States Constitutional Provisions Involved

[AMENDMENT V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

[AMENDMENT VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

[AMENDMENT] XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-702

BRUCE CHARLES BURGER,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This opposing brief is filed pursuant to the request of this Honorable Court contained in the letter of its Clerk dated January 9, 1974.

OPINION BELOW

The unreported opinion of the Court of Special Appeals of Maryland (No. 555 of the September Term, 1972) affirming Petitioner's convictions for the sale of LSD and possession of hashish by the Circuit Court for Montgomery County in a trial by jury on March 22, 1972, is found in the Appendix to the Petition. The Maryland Court of Appeals denied Cer-

tiorari on July 3, 1973, in Miscellaneous Docket No. 123 (Criminal), September Term, 1973.

JURISDICTION OF THE COURT

Petitioner has invoked the jurisdiction of this Court pursuant to the provisions of Title 28, U.S.C.A., Section 1257 (3).

QUESTIONS PRESENTED

1. Was the Maryland Court of Special Appeals correct in concluding that the Petitioner was not denied due process of law because the question of whether the State's doctors could give an opinion of sanity to a reasonable degree of medical certainty was a matter of the weight of the evidence and the credibility of the witnesses and hence, a question of fact for the jury.

2. Did the Maryland Court of Special Appeals properly decide that the jury's recommendation of leniency and continued rehabilitation, made after the fact, was surplusage.

3. Did the Maryland Court of Special Appeals properly determine that the record of the proceedings at Petitioner's trial did not permit the Court to ascertain whether or not the *voir dire* questions requested had been incorporated in the actual *voir dire* propounded to the prospective jurors.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner alleges that the Fifth Amendment, the Sixth Amendment, and Section 1 of the Fourteenth Amendment of the Constitution of the United States are involved.

STATEMENT OF FACTS[1]

Prior to the impaneling of the jury, the lower court preliminarily determined that the issue of sanity be submitted

[1] Extracted from the brief of Appellee in the Maryland Court of Special Appeals.

to the jury based on the report of Petitioner's private psychiatrist (Tr. 12). Subsequently, the lower court denied Petitioner's request to propound certain questions on *voir dire* (Tr. 13-15). Those questions, made a part of the record on appeal by stipulation of the Petitioner and Respondent are:

"[Drugs]

"4. Is there anyone among you who doubts that there are circumstances on which smoking marijuana could cause an illness and/or a mental defect?

"5. Is there anyone among you who feels that a person should be punished if he physically and-or psychologically has to use drugs, regardless of the circumstances?

"6. Is there anyone among you who could not give the defendant a fair trial because he feels the use of drugs is contrary to the teachings of his religion?

"7. Is there anyone among you who could not give the defendant a fair trial because he (she) feels the sale of drugs is contrary to the teachings of his religion?

"8. Is there anyone among you who could not give the defendant a fair trial because he (she) feels the giving away of drugs is contrary to the teachings of his religion?

"9. Is there anyone among you who knows someone who has used drugs and has suffered from it?

"10. Is there anyone among you who doubts that the use of drugs can change a person's perception of reality?

"11. Is there anyone among you who doubts that the use of drugs can and does impair a person's ability to know the difference between right and wrong?

"12. Is there anyone among you who doubts that the use of drugs could impair a person's ability to know the difference between right and wrong?

[Police Officers]

"5. Is there anyone among you who believes that police officers never use drugs?

"6. Is there anyone among you who believes that police officers never sell drugs?

"7. Is there anyone among you who believes that police officers never entrap people?"

After the jury was impaneled and counsel made opening statements, the prosecution called Gary J. Galle, who was a policeman assigned to the Narcotics Squad of the Washington, D.C. Police Department in December of 1970 (Tr. 19, 20). He testified that on the 5th of December, 1970, a person known to him as Adam introduced him to the Petitioner who stated that he had "acid" (Lysergic Acid Diethylamide) at another location and directed the witness to drive to Patton and Malcolm Drive where he alighted from the vehicle and returned shortly after with a plastic bag containing several tablets (Tr. 23). According to the witness, it was later ascertained by another officer that the bag contained approximately 1,000 tablets (Tr. 23).

Galle, known to the Petitioner and his associate as Joe Barker, paid Burger $300 for the tablets and requested that he be driven back to the location where they had met (Tr. 24). During the trip back to their meeting place, the Petitioner stated that he could obtain mescaline for $50 per pound and at least a thousand LSD tablets for the same price they had been sold on that night (Tr. 25). On December 23, 1970, the witness made another purchase of over one thousand tablets of LSD for $300, which purchase took place in the District of Columbia (Tr. 26). Galle stated that Burger appeared normal and did not display any unusual speech pattern on the 5th of December (Tr. 27).

Some time after the 23rd of December, 1970, the witness accompanied Montgomery County police to Cedar Street just north of Eastern Avenue in Silver Spring, Maryland, where they executed a search warrant on a location there

(Tr. 27). The witness reiterated that the Petitioner did not appear unusual on any of the occasions upon which he talked (Tr. 28). The chemist's report, a lock-seal envelope into which the plastic bag was placed, and the plastic bag containing the tablets purchased were marked as State's Exhibits 1, and 2 and 4, respectively (Tr. 29, 30).

Robert C. Arnold, an agent for the Federal Bureau of Narcotics in Washington, D.C. in 1970 and early 1971, testified that he analyzed State's Exhibits 2 and 4, the tablets purchased from the Appellant, and concluded that they were the hallucinogenic drug, LSD (Tr. 54, 55). State's Exhibits 1 through 5 were thereupon admitted into evidence (Tr. 56).

Corporal Harold Fremeau of the Montgomery County Police, testified that on the 16th of February, 1971, in company with another officer, he executed a search warrant on Apartment No. 1 of 7105 Cedar Avenue in Montgomery County, the lessee of the premises having been Joel David Pollack (Tr. 58, 59). A few minutes after gaining entrance to the apartment, the witness met the Appellant who had been either concealed or in one of the bedrooms (T. 59). Near a stairway leading from the inside of the apartment to a rear porch was found a cardboard box containing plastic baggies which contained pills (Tr. 60-62). In one of the bedrooms, there was a letter addressed to Bruce C. Burger and also found were a package of cigarettes, a package of baggies containing a green substance, and two books of matches (Tr. 66). Recovered from the top of the fireplace mantel was a package of cigarette papers, a gold cigarette case containing "suspected marijuana roach", one small piece of filter screen, a wallet containing Petitioner's identification, and twenty dollars in U.S. currency (Tr. 66-67). The detective identified the analysis report marked as State's Exhibit No. 11 for identification and stated that

beside the designation, Exhibit No. 5, was listed: "1. Is LSD, 6,000 tablets approximate value $12,000" (Tr. 68).

Corporal Fremeau further testified that the cardboard box recovered was found near a set of stairs leading to the rear of the apartment and that the steps did not lead to any other apartment although the area was accessible to others (Tr. 72). After qualifying Corporal Fremeau as to his experience in recognizing the drug, hashish, he was permitted to testify that State's Exhibit No. 14, a brown substance in tinfoil, was hashish (Tr. 73-75). That container along with State's Exhibit No. 15, a substance later indicated to be marijuana, was recovered from the same bedroom where the Petitioner's identification was found (Tr. 77). Also recovered from the bedroom where the Appellant's identification had been found was a gold cigarette case containing what the witness concluded was a marijuana cigarette and several butts (Tr. 79).

Dr. Robert Sauer, Clinical Director at Clifton T. Perkins State Hospital, was qualified as an expert witness and testified that he examined the Petitioner on December 7, 1971, during a two-hour interview and that the Petitioner was returned subsequently for the staff evaluation (Tr. 111). Based on his interviews with the Petitioner, the psychiatrist was able to conclude that "Mr. Burger was not suffering from any mental disorder, was not at the time of these alleged offenses, of such severity that would cause him to lack substantial capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of law" (Tr. 113).

Although Dr. Sauer had concluded that the Appellant was legally responsible prior to the staffing conference, he asserted that he did not reach his final opinion until after reading the other reports and interviewing the Peti-

tioner at the conference (Tr. 115). Received as State's Exhibit No. 20 was the Clifton T. Perkins psychiatric report of the Appellant (T. 116). When asked by the prosecution how the psychiatrist could determine an accused's mental state at the time of an offense occurring many months before the examination, Sauer essentially responded that the process was a reconstructing of the previous mental state as gleaned from the interview (Tr. 118). The doctor continued at Tr. 118:

> "Then, of course, we have a persons' own account of what his life was like at the time of the crime, and we asked them to try to probe for symptoms of mental illness occurring around the time of the offense, and I *didn't find any dramatic symptoms* from the account given to me by Mr. Burger.
>
> "Then, of course, we have gone ahead, we have the social service history gathered from relatives, and in this case it was his mother, and we asked her about symptoms of mental illness to see whether we could provide any facts that would make us state that he was really mentally ill at the time of the offense, and *this proved to be essentially negative* in this case, and then the psychological test to further test whether a person might have a held psychosis to further stressful situations, and psychological interview to see whether there would be any kind of severe emotional disorder, so we have to put all these things together and come to a conclusion about a person's mental functioning."

When further asked whether the opinion of Petitioner's ability to appreciate the criminality of his conduct and conforming would have been changed if it were assumed that he was a constant user of marijuana during the time of the offense, the doctor stated:

> "No, it does not change that opinion. We did make a diagnosis of drug dependence in Mr. Burger's case, and we feel that he was an habitual, heavy user of

> marijuana. However, it is my opinion that it had not so effected his mental functioning that he did not know what he was doing, that he could not control his actions" (Tr. 119).

It was further asserted that although the possibility Burger had been irreponsible on the day in question and had been cured by the time of the examination existed, there was nothing to make the psychiatrist feel that such was the case (Tr. 122).

When questioned extensively regarding the severity of the mental disorder suffered by the Petitioner at the time of the offense, Dr. Sauer responded, "In my opinion, he does not suffer from any severe mental disorder which would cause him to lack substantial capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of law" (Tr. 129). In response to another question regarding drug dependence, the doctor stated that the effects of marijuana wear off in a matter of hours and added:

> "Well, in my opinion, we have not established that Mr. Burger was drug intoxicated. He claims that he was 'stoned' the whole period. I doubt that very strongly. I believe he was just having repeatedly put himself into this state, but every morning when he woke up he was no longer drug intoxicated. It would have worn off, and he started anew that morning" (Tr. 135).

The witness continued asserting that there is no chemical test to determine whether a person once used marijuana; that although there is always a possibility that the evaluation of the Petitioner may have been different if the examination had been conducted earlier, such a possibility is no different from any other case where a subject is evaluated after the fact (Tr. 138, 139). The doctor con-

cluded that the alteration in Petitioner's life style could be attributed to an attempt to rehabilitate himself because he was arrested (Tr. 140).

On the second day of trial, Dr. Ian McKay, a staff psychiatrist at Clifton T. Perkins Hospital, testified that he was present during the staff evaluation of the Petitioner on December 13, 1971, and was able to form an opinion regarding his ability to conform his conduct to the requirements of law (Tr. 147). Dr. Mackay stated at T. 148:

> "My opinion was that Mr. Burger *did not suffer from a mental disorder* which would cause him to lack substantial capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of law. It was also my opinion that he was able to understand the nature and object of it and to assist in his defense."

The psychiatrist added that it would be unlikely that Burger would be able to conduct transactions involving figures, amounts, and weights if he were suffering from a mental disorder to the extent that he would be criminally irresponsible (Tr. 149). The doctor also stated that he found the Petitioner "perfectly well" and "nothing pathologically wrong with him" (Tr. 150). Dr. Mackay asserted that in most cases, an individual's capabilities would have been impaired considerably within six hours of the ingestion of LSD rendering it unlikely that he would be able to engage in negotiations involving prices and quantities (Tr. 152). According to the doctor, his conclusion regarding criminal responsibility "would still have been the same" irregardless to any consideration of the elimination of the use of drugs since the time of the offense or any therapy administered (Tr. 162). Subsequently, the State rested its case, requesting the Court to dismiss all but counts 1 and 4 of the indictment whereupon the motion

for judgment of acquittal was granted on all counts except numbers 1 and 4 (Tr. 182-184).

Dr. Bernard Murphy, a psychiatrist practicing out of Silver Spring, Maryland, testified that he interviewed the Petitioner approximately 20 to 25 times beginning in March of 1971 (Tr. 187). After asserting in his opinion, that the Petitioner had been muddled, disorganized and incoherent at the time of the initial interview and improved appreciably between March and mid-summer of 1971 (T. 190-195), Dr. Murphy stated his opinion regarding Petitioner's criminal responsibility at the time of the offense:

> "Yes, he did not have the capacity to appreciate the criminality of his acts or, in addition, to conform his conduct to the requirements of law" (Tr. 195).

Dr. Murphy, in response to a question regarding Petitioner's appreciation of the criminality of his act, did, however, say "Yes, he knew it was against the law" (Tr. 202).

At the conclusion of Dr. Murphy's testimony, the Petitioner moved for a mistrial on the basis that the initial admission of the 6,000 tablets into evidence was prejudicial to him (Tr. 215). He further stated, "Now, I will concede that I may be untimely in my motion for a mistrial" (Tr. 215). The lower court denied the motion for mistrial (Tr. 217) and the lower court instructed the jury, counsel thereafter making final summations (Tr. 220-225). Subsequently, the jury returned verdicts of guilty under counts 1 and 2 of the indictment.

ARGUMENT

I.

THE MARYLAND COURT OF SPECIAL APPEALS WAS CORRECT IN CONCLUDING THAT THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BECAUSE THE QUESTION OF WHETHER THE STATE'S DOCTORS COULD GIVE AN OPINION OF SANITY TO A REASONABLE DEGREE OF MEDICAL CERTAINTY WAS A MATTER OF THE WEIGHT OF THE EVIDENCE AND THE CREDIBILITY OF THE WITNESSES AND, HENCE, A QUESTION OF FACT FOR THE JURY.

Petitioner bases his application for this Honorable Court to review his conviction on the apparent allegation of a denial of the right to a speedy trial as guaranteed under the Sixth Amendment to the Constitution of the United States. It should be noted, at the outset, however, that the issue here presented was framed as follows in the Court of Special Appeals of Maryland:

> "The prosecution, as a matter of law, failed to meet its burden of showing that the appellant was sane at the time of the alleged offense." Petitioner's Brief in the Court of Special Appeals, p. 25.)

The only direct and express reference to the right to a speedy trial is made at page 30 of Petitioner's Brief in the Court of Special Appeals in which it is asserted that the "right to a speedy trial is the right to freshly preserved evidence." The thrust of the Petitioner's argument, however, was that the psychiatrists who testified for the State did not establish sanity sufficient to overcome the testimony of the independent psychiatrist who testified for the Petitioner. As a consequence of the manner in which the issue was framed, the Court of Special Appeals of Maryland specifically answered the question raised, rather than the collateral question which Petitioner here seeks to base the principal thrust of his argument.

Although Respondent takes the position that the question has not been properly preserved for appellate review, it should be noted that the independent psychiatrist, Dr. Bernard Murphy, testified that he first examined the Petitioner in March of 1971 (Tr. 187; Petitioner's Brief in the Court of Special Appeals, p. 27). The docket entries of the lower court proceeding reflect that Petitioner submitted his plea of not guilty by reason of insanity on May 10, 1971, approximately two months after Dr. Murphy had commenced examination of the Petitioner. Thus, it would appear that Petitioner, in failing to enter his plea of not guilty by reason of insanity until May 10, 1971, prevented the State from affording him an examination by the State psychiatrist prior to that date.

With respect to the court orders of June 18, 1971 and July 27, 1971, Petitioner was permitted to remain on bond and undergo an outpatient examination to be scheduled by the Department of Mental Hygiene. When it appeared, to the court, that the Department of Mental Hygiene and the Clifton T. Perkins State Hospital had been unable to comply with the order of June 18, 1971, the Circuit Court for Montgomery County vacated the original order and directed the Petitioner to report to the Department of Mental Hygiene for mental examination, again allowing him to remain on bond pending trial. It was also ordered that service of the order be made on Petitioner's counsel, thereby imposing a duty upon counsel and his client to assist in facilitating the speedy examination since the Petitioner was not in custody at the time.

From the above, it is clear that some confusion had occurred relating to the initial order and that the subsequent order was passed for the purpose of placing the responsibility on the Petitioner to report to the Department of Mental Hygiene. It is further clear that permitting the Petitioner

to remain on bond was done as an accommodation to him, but made it incumbent upon him to assist in the facilitating of the psychiatric examination which he had requested. In the absence of some affirmative showing of a good faith effort between July 27, 1971 and December 7, 1971, to obtain an immediate examination, fundamental fairness precludes Petitioner from now objecting to the delay in the examination.

Notwithstanding that the court order of July 27, 1971 placed the onus on Petitioner to report for the examination, the prosecutor asked the following question of Dr. Sauer, a psychiatrist who testified on behalf of the State:

> "(Assistant State's Attorney) As a matter of fact, in this case, would your evaluation have been appreciably easier if you had seen Mr. Burger, say in March or April of 1971, than in December of 1971?
>
> (Dr. Sauer) Well, in my opinion, it would not have made any difference. As I said before, there is always a possibility that it may have been different.
>
> (Assistant State's Attorney) Well, that is that kind of a possibility in any case where you have to evaluate someone after the fact, isn't that correct?
>
> (Dr. Sauer) Right" (Tr. 139).

Additionally, Dr. Sauer was asked, "How can you say that he did or did not meet the tests of the statute regarding criminal responsibility in the State of Maryland, based on an interview many months after the offenses themselves?" (Tr. 118). The doctor responded that the staff psychiatrists "constantly have to face [it] in our work and that the process involved the reconstruction of a person's mental state at the time of the accused act." He went on to explain that when a person has suffered a severe breakdown, psychosis or severely disabling neurosis, usually traces of it still exist at the time of the interview and that rarely is recovery from such severe mental illness 100 per cent complete when a

rather detailed psychiatric interview is administered (Tr. 118). The doctor went on to describe the procedure used in evaluating the Petitioner.

In all of the cases by this Court and the appellate courts of Maryland involving the claim of a denial of the right to a speedy trial, one of the requirements is to demonstrate prejudice that has resulted therefrom. *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182; *United States v. Marion*, 404 U.S. 307, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971). Respondent respectfully urges that no prejudice can be shown where Petitioner was examined by his own psychiatrist in March of 1971, but did not enter his plea of not guilty by reason of insanity until May 10, 1971, although he had been indicted on March 15th, 1971. It is further respectfully submitted that the lower court order of July 27, 1971, was specifically passed to remedy any defect in the order of June 18, 1971 and placed the responsibility on the Petitioner to report for examination immediately and that Petitioner did nothing to facilitate such examination, notwithstanding that the Circuit Court for Montgomery County ordered that a copy of the order be served on his counsel. Finally, the question of the denial of the right to a speedy mental examination was not raised, as such, but was merely an appendage to the Petitioner's claim that the State had not met its burden in establishing that the Petitioner was sane at the time of the offense. Accordingly, the Court of Special Appeals of Maryland decided the question presented, as framed, on the basis that it was for the jury to determine the credibility of the State's psychiatrist in his assertion that his examination was no different from any other examination made after the fact and the delay in the examinations performed by the State psychiatrist went only to the weight of the evidence. Respondent would further draw this court's attention to the fact that Petitioner made no motion to dismiss

on the basis of the denial of the right to a speedy trial and, hence, no challenge was made to the validity of the indictment on any constitutional grounds until the oblique treatment as contained in the Petitioner's brief in the Court of Special Appeals and the direct challenge on appeal to this court, wherein, for the first time, Petitioner directly attempts to invoke the Sixth Amendment to the Constitution of the United States.

II.

THE MARYLAND COURT OF SPECIAL APPEALS PROPERLY DECIDED THAT THE JURY'S RECOMMENDATION OF LENIENCY AND CONTINUED REHABILITATION, MADE AS AN AFTERTHOUGHT, WAS SURPLUSAGE.

The following discussion took place after the jury returned from its deliberations in the Circuit Court for Montgomery County:

> "(The Forelady) We find the defendant, Bruce Charles Burger, sane at the time of the commission of the crime.
>
> (The Clerk) What say you, is he guilty of the matter whereof he stands indicted under Count Number One or not guilty?
>
> (The Forelady) Guilty on Count One.
>
> (The Clerk) Is he guilty of the matter whereof he stands indicted under Count Number Four or not guilty?
>
> (The Forelady) He is guilty on Count Number Four.
>
> (The Clerk) Ladies and gentlemen of the jury, hearken to your verdict as it stands recorded.
>
> (The Forelady) I have one more thing to say. We were permitted to request leniency and continued rehabilitation.
>
> We only make these guilty verdicts with the request for leniency and continued rehabilitation.
>
> (The Court) You have a right to recommend mercy.
>
> (Mr. Craven) May we approach the bench, Your Honor?

Bench Conference reported as follows:

(Mr. Craven) If Your Honor please,—

(The Court) I didn't hear all of what she said.

(Mr. Craven) She requested leniency and continued rehabilitation. The Rule doesn't contemplate that kind of limitation, but we don't have any argument with the form of the verdict.

(Mr. Rosenberg) My problem, Your Honor, is that I think that we have here a jury, after approximately one hour and 50 minutes, coming to a compromise where they are going to find the boy sane, if we keep him under the care of the same rehabilitative forces, going to school and the psychiatrist.

I know there have been capital cases where the jury has been reinstructed that they can come back with leniency or mercy in the case.

(The Court) The Court construes the request in substance as a recommendation of mercy. The other words outside of it recommending mercy the Court will just consider as surplus, but in substance it is a recommendation of mercy and the jury has a right to do that.

(Mr. Craven) We submit that that is true, Your Honor.

(The Court) So I think the verdict can be taken and recorded. Do you wish to poll the jury?

(Mr. Rosenberg) I think I would, yes.

(Mr. Craven) Perhaps Your Honor would want to inquire of the jury if their verdict is guilty on those two counts with a recommendation for mercy.

(The Court) Did they report that?

(Mr. Craven) She did, but she, of course, added the words recommend leniency and continued rehabilitation. I think that a proper term would be guilty under the two counts of the indictment, with a recommendation of mercy.

(The Court) Very well.

(Whereupon, the hearing resumed in open court.)

(The Court) Poll the jury. Just ask whether the forelady's verdict is their verdict.

(Whereupon, the Clerk asked of each juror whether the forelady's verdict was their verdict and all answered, yes.)

Ladies and gentlemen of the jury, hearken to your verdict as it stands recorded. Your forelady saith that Bruce Charles Burger, prisoner at the bar, is sane, that he is guilty as charged under Count Number One, that he is guilty as charged under Count Number Four of the indictment, and so you all say?

(The Jury) Yes.

(The Court) Excuse the jury.

(The Clerk) Ladies and gentlemen of the jury, you are excused until Tuesday morning at your regular time. You will report to the Jury Commissioner (Tr. Supp. 3-6).[2]

From the above, it is crystal clear that the verdicts with respect to sanity and guilt were in no way changed and that the Forelady, in fact, expressed both decisions of the jury and added the request for leniency and continued rehabilitation after making the verdicts known. There is thus no factual basis upon which the Petitioner can build his theory that the verdict was interfered with or illegally changed. Under Maryland law, the jury has no function with respect to disposition of an accused or the punishment phase of the proceedings. The law of Maryland, as set forth in *Gatewood v. State*, 15 Md. App. 450, 560, 291 A.2d 688, and *Mahoney v. State*, 13 Md. App. 105, 281 A.2d 421, is that the sentence of a criminal court will not be disturbed unless motivated by passion, ill will or prejudice or some other unworthy

[2] The designation, "Tr. Supp.," indicates the proceedings upon taking the jury's verdict, which proceedings were contained in a supplementary transcript.

motive. Maryland Rule 758 of the Maryland Rules of Procedure entitled, "Verdict," provides under Subsection e:

> "A jury may attach to its verdict a recommendation to the court to show mercy to an accused. Such recommendation shall not be binding upon the court."

The excerpt from the proceedings upon the taking of the verdict from the jury forelady clearly indicate that she merely wished to express the desire for the court to exercise leniency and to order continued rehabilitation for the Petitioner; however, Maryland Rule 758 clearly directs that such a recommendation not be made binding upon the court. Respondent would merely submit that the transcript excerpt speaks for itself and that no violation of any right, constitutional or otherwise, is involved.

III.

THE MARYLAND COURT OF SPECIAL APPEALS PROPERLY DETERMINED THAT THE RECORD OF THE PROCEEDINGS AT THE PETITIONER'S TRIAL DID NOT PERMIT THE COURT TO ASCERTAIN WHETHER OR NOT THE *VOIR DIRE* QUESTIONS REQUESTED HAD BEEN INCORPORATED IN THE ACTUAL *VOIR DIRE* PROPOUNDED TO THE PROSPECTIVE JURORS.

The main thrust of Petitioner's final contention apparently is that the trial court's examination of the venire resulted in the impaneling of a jury which was biased in favor of his conviction. At the outset, Maryland has no rule or statute defining the objects of inquiry in determining the eligibility of jury men although cases have established that questions must relate to some specific issue of eligibility. *Phenious v. State*, 11 Md. App. 385, 389, 274 A.2d 658; *Rodgers v. State*, 4 Md. App. 407, 243 A.2d 28. The nature and extent of *voir dire* examination rests in the sound discretion of the trial court. Its purpose is to ascertain whether the prospective jurors are free from bias or prejudice or capable of making objective and impartial findings. *Rodgers*

v. State, supra; Culver v. State, 1 Md. App. 406, 417, 230 A.2d 361; *McIntyre and Davis v. State*, 1 Md. App. 586, 232 A.2d 279.

The burden is on a defendant to show that a jury hearing his case was not impartial, not free from bias and prejudice, and incapable of making impartial and objective determinations. *Quiles v. State*, 4 Md. App. 354, 357, 243 A.2d 661.

The Court of Special Appeals of Maryland, faced with a similar situation in *Gibson, Tate and Austin v. State*, 17 Md. App. 246, 300 A.2d 692, decided at pages 250 and 251:

> "The record before us in appeal #413, Henry Gibson, leaves much to be desired as there is no *voir dire* examination reported therein. Consequently, we are unable to evaluate the *voir dire* for the presence or the possibility of actual prejudice on the part of the talesmen. The record in appeal #629, Robert T. Austin, does, however, contain 'Voir Dire Requests' made by Austin's then council. Handwritten on the bottom of the 'Requests' is the notation 'all questions asked.' There is no contention here that the questions were not asked, and we assume that they were actually propounded to the jury panel. The questions are obviously designed to disclose prejudices, including those founded on pretrial publicity and race. The record is silent as to the answers to the *voir dire* interrogation as apparently no transcript was made. While in Austin's case we possess the questions and the belief that they were asked, we are no better off insofar as evaluating prejudice, or the possibility of prejudice resulting from pretrial publicity, than we are in the Gibson appeal.
>
> Gibson and Austin were convicted in separate jury trials, and Tate was convicted in a non-jury trial."

As stated in the well reasoned opinion of the Maryland Court of Special Appeals, it may be true that the series of questions submitted were not asked by the trial court, but the Court of Special Appeals was unable to say that the

questions which were asked by the trial court "did not touch upon or embrace the specific questions of the Appellant." The court, in the instant case, finally concluded that, "There is nothing for us to review." Respondent adheres to the reasoning of the Maryland Court of Special Appeals and further submits that the requested *voir dire* examination was more in the nature of a "fishing expedition" and did not relate to some specific issue of eligibility.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of February, 1974, I served a copy of the Brief in Opposition to Petition for Writ of Certiorari in the above entitled case, by depositing same in the United States mail, postage prepaid, to attorneys for Petitioner:

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